No. 84-1503 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHICAGO TEACHERS UNION, LOCAL No. 1, AFT, *et alia*,
Petitioners,

v.

ANNIE LEE HUDSON, *et alia*,
Respondents.

On petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION

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24 April 1985

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BRIEF IN OPPOSITION

INTRODUCTION

Pursuant to Rule 22 of the Rules of this Court, respondents Annie Lee Hudson, *et alia*, file this brief in opposition to the petition for a writ of certiorari filed by the Chicago Teachers Union, Local No. 1, AFT (CTU).

COUNTERSTATEMENT OF THE FACTS

Respondents generally accept the CTU's statement of

facts, except for the implication therein (explicitly repeated in later portions of the petition as a "fact") that the "procedure" for challenging the so-called "proportionate-share payments" at issue in this case was somehow "state created", and contemplated direct involvement of the Illinois courts.[1] This implication is decidedly improper. For, except through the Board of Education as the compliant collector of the proportionate-share payments, the State of Illinois has *no role whatsoever* in the alleged procedure, either as its creator, or as its administrator, or as its ultimate supervisor.[2]

First, the statute at issue here neither created nor referred to any procedure for challenging the amount of a proportionate-share payment, instead mandating simply that such payments "shall be deducted by the board from the earnings of the non-member employees and paid to the [CTU]".[3]

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[1] *See, e.g.*, Petition at 18 ("the state has provided [non-union] employees *a right to proceed directly to state court* to raise their objections to the amount of the proportionate share payment"), 19 ("the hearing could have been before a state-court judge *ab initio*"), 19 ("the judicial procedures that already are available to objecting fee payers as a matter of state law"), 20-21 ("it is most explicitly *not* the task of the federal judiciary, in adjudicating constitutional challenges to a hearing procedure established by a State, to assess the wisdom or or [*sic*] lack thereof of a particular state-created procedure").

[2] Thus, it is hardly accidental that the State, including the officers and members of the Board of Education, has chosen not to join in the instant petition. *See* Letter of 27 March 1985, from Charles Orlove, Esq., counsel for petitioners, to the Clerk of the Supreme Court of the United States, notifying the Court that representatives of the Board "will take no part in [this] matter".

[3] Ill. Rev. Stat., ch. 12, § 10-22.40(a) (1983), *quoted* in toto *in* Petition at 2. In as much as the statute rigidly specified that the proportionate-share payments shall be "measured by the amount of [union] dues uniformly required by [*sic*, no doubt 'of' was intended] members", no procedure for challenging the size of the payments was indicated. No doubt realizing the obvious substantive unconstitutionality of a statute that required non-union employees to pay proportionate-share payments equal to dues of full union members, no matter what the true collective-bargaining costs of the union might be, the Illinois legislature enacted a new law authorizing deduction of a "fair share * * * not to exceed the dues uniformly required of members". *See* Petition at 3 n.1. This new law is not at issue here.

Second, the applicable collective-bargaining agreement recites the Board's acquiescence in deductions of proportionate-share payments from the salaries of non-union employees such as respondents, but contains no procedure by which those employees can challenge the amount of or method of imposing the deductions.[4]

Third, the CTU unilaterally informed the Board of the amount of the payments it demanded, without presenting to the affected employees, the Board, or any other agency of the State any evidence tending to substantiate its claims; and without subjecting those claims to any investigation whatsoever by the employees, the Board, or any other state official.[5]

Fourth, docilely complying with CTU's demand, the Board deducted the proportionate-share payments, and transferred the monies to CTU, without even attempting to verify the propriety of its actions.[6]

Fifth, on its own initiative, CTU established what it calls "an appeals procedure" involving written objections by non-union employees to the proportionate-share payments, "an internal union review", and "a decision by

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[4] *See* Petition at 4.

[5] *See id.*

[6] *See id.*

an impartial arbitrator" whom CTU selects.[7]

Nowhere in this union-created and union-controlled "appeals procedure" is there any meaningful mandatory involvement of the State (excepting, of course, the Board's complicity as collection-agent). To be sure, the State may eventually intervene if dissenting employees either: (i) challenge the CTU's arbitration-award in court; or (ii) initiate a separate lawsuit on their own.[8] But to imply, as CTU repeatedly does, that the state courts are *part of* its "appeals procedure" is patently untrue, their involvement (if any occurs) being wholly contingent on affected employees' going *beyond* the "procedure" or *outside of* it altogether.

In effect, the stark facts are these: With the assistance of the Board, CTU has told non-union employees, "We intend to seize the portion of your salaries that we say we are entitled to have; and if you want to complain about it, either avail yourselves of our 'internal union review' and arbitration-scheme (being bound thereafter by the limitations on judicial review that Illinois imposes on arbitration-awards), or sue us on your own in state court." The "procedure" that CTU offers these employees, then, is *employee-initiated litigation*, either after or without arbitration. In short, CTU takes their money and then tells dissatisfied employees: "Sue us!"

REASONS FOR DENYING THE WRIT

Given the facts of this case, granting a writ of certiorari would be improvident, for three reasons. *First*, the CTU's self-generated and self-applied "appeals procedure" lacks procedural due process on its face. And the Court of Appeals' recognition of this demerit reflects nothing more than that court's application of the substantive rule of *Abood* v. *Detroit Board of Education*[9] to the procedural-due-process context. *Second*, to adopt the CTU's interpretation of this Court's summary dismissals of *Jibson* v. *White Cloud Education Association*[10] and *Kempner* v. *Local 2077, AFSCME*[11] would require overruling this Court's plenary decisions in both *Abood* and *Ellis* v. *BRAC*[12]. And *third*, review of a case such as this is premature, absent development of a full factual record describing the actual workings of an arguably proper proportionate-share-payment scheme.

[7] *See id.* at 4-5.

[8] *See id.* at 5.

I. Far from being "unprecedented", the Court of Appeals' decision is the logical procedural-due-process application of the substantive teaching of *Abood* v. *Detroit Board of Education*.

CTU complains that "[t]he first error of the [C]ourt [of Appeals] was in finding [that non-union employees have] an expansive—indeed unprecedented—liberty interest" that requires procedural protection.[13] Contrary to CTU's misrepresentations, the Court of Appeals did no such thing. Rather, it faithfully followed *Abood* in holding that any proportionate-share-payment scheme infringes on non-union employees' "liberty" (specifically,

[9] 431 U.S. 209 (1977).

[10] _____ U.S. _____, 105 S. Ct. 236 (1984).

[11] _____ U.S. _____, 105 S. Ct. 316 (1984).

[12] _____ U.S. _____, 104 S. Ct. 1883 (1984).

[13] Petition at 15.

their First-Amendment freedom of association), but that this infringement is constitutional if the union uses the payments to defray its collective-bargaining expenses.[14] The Court of Appeals then applied this substantive teaching of *Abood* to the procedural-due-process context, holding (unexceptionally) that the admitted deprivation of employees' "liberty" is constitutional only if the State has mandated procedures that guarantee that the payments will, in fact and law, subsidize the union's collective-bargaining activities alone.[15]

This holding is hardly "unprecedented", or even mildly surprising. For *all* state action resulting in deprivations of "liberty"—or of "property", which deductions of respondents' proportionate-share payments clearly involve, too—requires procedural due process to be constitutionally valid.[16] Here, that process must include the necessary factual-*cum*-legal determination that the union will use the payments only for collective-bargaining purposes. For, if it does not, the deprivation of "liberty" (and "property") will not satisfy the requirement of *Abood* that justifies it in the first instance. And so even CTU understands, when it says that this Court's "decisions teach that no deprivation of associational freedom occurs *unless an objector's fee is in fact expended for activities not 'germane to collective bargaining'*".[17] Obviously, the

[14] *Contrast id.* at 15-17 *with* Appendix at A-6 to A-8.

[15] *See* Appendix at A-8 to A-9. As the Court of Appeals correctly explained, this Court "in *Abood* had no occasion to decide whether an agency fee * * * may not be exacted unless the dissenter is given due process of law". *Id.* at A-8.

[16] *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 571-72 (1972); Fuentes v. Shevin, 407 U.S. 67, 84-90 (1972).

[17] Petition at 17 (emphasis supplied).

"unless" qualification implicates a fundamental issue of procedural due process: namely, does the taking occur pursuant to a procedure that guarantees that "an objector's fee is in fact expended [only] for [collective-bargaining] activities"? Thus, CTU refutes itself when it pretends that this Court's decisions do not support—indeed, logically compel—the holding of the Court of Appeals.[18]

If anything is "unprecedented" here, it is CTU's brazen contention that no constitutional problem arises when it and the Board agree to seize monies from the salaries of dissenting non-union employees simply on CTU's unilateral claim of right to those monies, and without any pre-seizure hearing or other process before an impartial governmental agency, simply because the victims—assumedly with CTU's blessing—can thereafter repair to the state courts to protest. On its face, this apology proves too much: For if the procedural-due-process require-

[18] The "unless" qualification that CTU itself articulates requires that, for a proportionate-share-payment scheme *not* to violate non-union employees' freedom of (non)association, there must be a determination, at a meaningful time and in a meaningful manner, of the factual-*cum*-legal question of the relatedness *vel non* of the payment to the recipient union's collective-bargaining activities. If procedural due process obtains, the union will receive and be able to spend no monies from dissenting employees except their share of its collective-bargaining expenses. Conversely, absent procedural due process, a serious likelihood exists that the union will receive and be able to spend non-union employees' monies for *non*-bargaining purposes—which spending, by constitutional hypothesis, equals a deprivation of dissenters' First- and Fourteenth-Amendment liberties. Therefore, the absence of procedural due process in a proportionate-share-payment scheme strongly implies (if it does not insure) a loss of employees' fundamental freedoms, without or in reckless disregard of the absence of the countervailing governmental interest in supporting and subsidizing collective bargaining that *Abood* held justifies such a scheme. Or, the absence of procedural due process almost

ments of the First and Fourteenth Amendments were satisfied whenever and because an individual deprived of liberty or property could later on contest that denial in a state court, the very existence of state courts of general jurisdiction would largely eliminate procedural due process from constitutional jurisprudence.

CTU's contention also assumes what is contrary to fact: namely, that the state courts are somehow an integral part of its proportionate-share-payment scheme. CTU refers to a "hearing procedure established by [the] State"[19]—when, in reality, the state judiciary can intervene only if a dissenting employee *completely disregards* CTU's arbitration-procedure, or attempts to overturn the arbitrator's decision (under the prevailing rule of law limiting judicial review of arbitral action). Thus, contrary to CTU's complaint, the Court of Appeals did not negatively "assess" the "lack [of wisdom] of a particular state-created procedure", or mandate an "ideal" it thought "somehow superior to the judicial process available in Illinois".[20] Rather, the Court of Appeals disapproved of the absence of *any* truly *state*-created procedure *integral* to the seizure of proportionate-share payments, and mandated essentially *any* procedure *free from unilateral union control.*

Simply put, the Court of Appeals found that procedural due process requires more than that CTU dare dissenting employees to "Sue us!" when the union and the

surely equals a violation of *Abood*. *See, e.g.*, Speiser v. Randall, 357 U.S. 513, 520-29 (1958).

[19] Petition at 20-21.

[20] *Id.* at 21.

Board conspire to seize part of their salaries as putative proportionate-share payments. If this determination raises a question of constitutional law justifying issuance of a writ of certiorari, the jurisprudence of procedural due process has devolved into a sorrowfully primitive state indeed.

II. Remanding this case for the Court of Appeals to consider this Court's dismissals of *Jibson* v. *White Cloud Education Association* and *Kempner* v. *Local 2077, AFSCME* would waste judicial resources, in as much as CTU's interpretation of those dismissals is palpably erroneous.

To bolster its claim that the Court of Appeals' decision is "unprecedented", CTU cites this Court's unexplicated dismissals of appeals in *Jibson* and *Kempner*, adding its own interpretive gloss to the effect that these decisions impliedly uphold everything it and the Board tried to do to respondents.[21] The short and sufficient answer to this argument is that, whatever this Court's reasons for summarily dismissing *Jibson* and *Kempner*, they could *not* have been the reasons CTU advances, unless this Court meant by those dismissals *sub silentio* also to overrule both *Abood* and *Ellis*.

This Court's summary disposition of appeals "have considerably less precedential value than an opinion on the merits",[22] and constitute precedent only "on the precise issues presented" by "the particular facts involved in a case", rather than indicating general acceptance of the

[21] *Id.* at 9-14.

[22] Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 180-81 (1979).

reasoning subtending the lower courts' decisions.[23] For that reason, the significance of this Court's action in *Jibson* and *Kempner* must "be assessed in the light of all the facts in [those] case[s]", not simply upon CTU's self-interested interpretation of the questions presented in the appeals.[24]

Vacating the Court of Appeals' decision and remanding this case for that court to speculate on this subject would manifestly waste judicial resources, in as much as no sensible Court of Appeals would hold that the mere summary dismissals in *Jibson* and *Kempner* have radically transmogrified the legal principles this Court so painstakingly explained and applied in its plenary decisions in *Abood* and *Ellis*. Rather, the Court of Appeals would follow this Court's admonition that the summary dismissals should "'not * * * be read as a renunciation'" by this Court of *Abood* or *Ellis*, and "should not be understood as breaking new ground".[25] Instead, the Court of Appeals would simply distinguish *Jibson* and *Kempner* on one or more of many alternative grounds, and then re-instate its earlier opinion, which alone gives procedural-due-process "teeth" to the substantive holdings of *Abood* and *Ellis*.[26]

For example, the Court of Appeals could easily distinguish *Kempner* because the internal union exhaustion-requirement upheld in that case was imposed as a prerequisite to the filing of an administrative complaint by a dissenting employee, not as a bar to judicial relief.

[23] *Id.* at 182-83; Mandel v. Bradley, 432 U.S. 173, 175-77 (1977).
[24] Mandel v. Bradley, 432 U.S. 173, 177 (1977).
[25] *Id.* at 176.
[26] Seen in this light, CTU's petition reduces to an attempt to appeal the

Indeed, the lower court in *Kempner* expressly recognized the availability "of the alternative remedies set forth in *White Cloud* [*Education Association* v. *White Cloud Board of Education*]", an earlier decision of the same court on the same subject-matter.[27] In *White Cloud*, the state court held that a non-union employee can be required to pay a disputed fee to a union before the proper amount of the fee has been judicially determined, only because the employee could "immediately file suit for declaratory judgment" and move for an *expedited* hearing under state law. The court's reason for this holding was that "the employee can quickly move for a resolution of the issue and a vindication of his constitutional rights", a rationale that does not apply where (as here) the employee must first exhaust a time-consuming union-controlled arbitration-procedure, or file his own lawsuit without any guarantee of an expedited hearing on the merits.[28]

III. This Court should not review this or any other case involving the procedural-due-process merits of a proportionate-share-payment scheme until the lower courts have developed a full factual record describing how such a procedure, arguably valid in law, actually works in practice.

If *Jibson* and *Kempner* teach anything, it is the truism

Court of Appeals' denial of CTU's motion for reconsideration of the union's motion for rehearing. *See* Petition at 14.
[27] Kempner v. Local 2077, AFSCME, 126 Mich. App. 452, 460, 337 N.W.2d 354, 358 (1983), *citing* White Cloud, 101 Mich. App. 309, 300 N.W.2d 551 (1980).
[28] *Compare and contrast* White Cloud, 101 Mich. App. at 318-19, 300 N.W.2d at 555.

that constitutional questions are not ripe for adjudication absent development of a full factual record. Those cases came to this Court presenting naked questions of law, without factual records describing how the procedural schemes there involved actually worked. In as much as the schemes in *Jibson* and *Kempner* were arguably valid in law (depending on the precise facts of their operations and applications), but had not been tested in the crucible of real-world practice, dismissal of the appeals most logically indicated their prematurity.

This case is equally unripe for plenary review, for two reasons. First, CTU's original proportionate-share-payment scheme is not even arguably valid in law, but instead constitutes a procedure without the barest semblance of due process. To issue a writ of certiorari to affirm the Court of Appeals' decision on this point would be a waste of this Court's time. Second, if and when CTU and the Board do develop a plan that on its face meets the minimum requirements of procedural due process, investigation of the plan's operation and effect in practice will still be necessary—to determine whether or not the plan's provisions for the traditional due-process elements of notice, hearing, and judicial review satisfy the fundamental constitutional standard of procedural "meaningfulness". For this Court to issue a writ of certiorari now to state in purely abstract terms the need for CTU at some later date to guarantee these elements in a "meaningful" way would amount at best to an academic exercise.

CONCLUSION

For the foregoing reasons, this Court should deny the petition.

Respectfully submitted,

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24 April 1985